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NO. 739 OCTOBER TERM, 1918

IN THE

Supreme Court of the United States

I. TUCKER BURR, *et al.*
Plaintiffs and Appellants

vs.

CITY OF COLUMBUS, *et al.*
Defendants and Appellees

Petition and Motion to Advance and to Have Case Heard With Case of Columbus Railway Power and Light Company vs. City of Columbus, et al., No. 715, October Term, 1918.

KARL E. BURR
JOSEPH S. CLARK
HENRY J. BOOTH
W. O. HENDERSON
Attorneys and Counsel for Petitioners

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PETITION AND MOTION TO ADVANCE CASE AND TO HAVE IT HEARD WITH COLUMBUS RAILWAY, POWER AND LIGHT COMPANY VS. CITY OF COLUMBUS, *et al.*, NO. 715, OCTOBER TERM, 1918

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes I. Tucker Burr, Winthrop Burr, A. Lawrence Pierson, Thomas S. Gannett, Jr., Constantine Hutchins, Richard Austin, James N. Wheeler and William J. Sturgis, plaintiffs and appellants, and file this their petition and motion that the above entitled case be advanced upon the docket of this Court and be heard with the case entitled "The Columbus Railway, Power and Light Company vs. City of Columbus, *et al.*, No. 715, October Term, 1918."

Your petitioners respectfully represent that the following is a brief statement of the matter involved, to wit:

Your petitioners are the holders of more than two hundred thousand dollars ($200,000) of the First Refunding Extension and Sinking Fund Five Per Cent. Mortgage Bonds, issued by the Columbus Railway, Power and Light Company, secured by a First Refunding Extension and Sinking Fund Mortgage covering all of the properties and franchises of the said company; said bonds being dated the first day of April, 1915, and maturing on the first day of October, 1940, and carrying interest at the rate of 5% per annum, payable on the first days of April and October in each year.

Said The Columbus Railway, Power and Light Company owns and operates a system of street railway lines in the City of Columbus, Ohio, and until August 20, 1918, operated said railway lines under two certain franchise grants issued by the City of Columbus to predecessor railway companies, which franchise grants specified the rates of fare to be charged. These rates of fare were reasonable when the grants were issued and accepted, but have become unreasonable and confiscatory by recent very great increases in cost of operation, including particularly the cost of all labor and supplies, due primarily to the present war. These franchise grants require said company to issue eight tickets for twenty-five cents, and to give universal free transfers with the result that said company receives only an average of 2.6 cents for a car ride, counting a ride on a transfer as a separate ride.

On August 20, 1918, said company, having theretofore made various unsuccessful efforts to secure from the City the right to charge higher rates of fare, addressed a written communication to the City setting forth the facts, and stating particularly that the rates of fare had become confiscatory; and by said written statement said company surrendered, cancelled and abandoned these franchise grants and has since said date been a tenant at sufferance upon the streets except for certain perpetual fran-

chise rights in a few of said streets, and said company has since said date been giving street railway facilities to the people of the City of Columbus at an increased fare of five cents for a car ride and one cent for a transfer. Immediately after delivering said written communication to the City, said company instituted a suit in the United States District Court, for the Southern District of Ohio, sitting in equity, by filing a bill therein, asking for an injunction to restrain said city from enforcing said franchise grants and particularly the confiscatory rates of fare therein prescribed. After The Columbus Railway, Power and Light Company instituted said suit, your petitioners, who are citizens and residents either of the State of Massachusetts, or the State of New York, or the State of New Jersey, and therefore non-residents of the State of Ohio, instituted this suit in the United States District Court, for the Southern District of Ohio, by filing the bill herein against the same defendants, asking for a similar injunction.

Your petitioners further represent that their reasons for this application are that this case presents certain questions of great interest and importance at the present time because of the fact that so many street railway companies throughout the country are embarrassed financially and either operating at a loss or unable to pay their fixed charges, this result being due to the very great increases in operating expenses caused by the war, such increases amounting to 100%, 200% and sometimes 300% in certain items; and such companies, in most cases, are unable to secure the consent of the local authorities to make any reasonable increases in their rates of fare, and cannot increase their rates without violating franchise conditions. The questions presented in this case may be properly stated as follows:

1. Does a municipal franchise grant to a street railway company, issued in the year 1901, under the

laws of the State of Ohio, for a term of twenty-five years with specified rates of fare, reasonable when the grant was issued and accepted, but which have become unreasonable and confiscatory by reason of great increases in the cost of operations, bind the street railway company to continue operating its railway lines at a loss under said rates of fare for the balance of the term of twenty-five years, or until said company becomes insolvent and unable to continue its operations under said grant, provided said company has surrendered or attempted to surrender said grant to the city by written instrument addressed and delivered to the proper authorities of the city?

2. Are the rates of fare specified in said grant prescribed rates or agreed rates? *Milwaukee Electric R. & L. Co. vs. Railroad Commission*, 238 U. S. 174.

3. Is not the 14th Amendment a complete protection to the street railway company against the enforcement of such confiscatory rates of fare even if such rates are agreed rates and, if not, then is not the 14th Amendment a complete protection, provided said rates are prescribed rates?

4. The great increases in operating expenses of the Railway Company, being directly due to the war and the developments presenting a situation not within the contemplation and expectation of the city or the railway company when the grant was issued and accepted, is not the court authorized and required to imply a condition in the grant, that such obligations as it imposes were not intended by the parties to continue or to be enforced in the unexpected emergency which has arisen? *Guaranty Trust Co. vs. North German Lloyd Co.*, 244 U. S. 12; *Metropolitan Water Board vs. Dick Kerr & Co.* (1918) Appeal Cases (Eng.), 119 House of Lords, Nov. 26, 1917.

5. Does not an award of the War Labor Board, appointed by the President of the United States, under the authority conferred upon him by Act of Congress, which award increases the wages paid by the Railway Company

annually over 50%, making an annual increased wage payment of $560,000, which causes the company to operate at a loss, present a situation which authorizes and requires the court to imply such a condition in the franchise grant?

6. Will a court of equity enforce specific performance of a franchise grant with specified rates of fare which, although reasonable at the time the grant was issued and accepted, have become confiscatory by changed conditions?

Your petitioners further represent that the President of the United States was authorized by the Act of Congress entitled "An Act Making Appropriations For the Support of the Army For the Fiscal Year Ending June 30th, 1917, and For Other Purposes (Acts of 64th Congress, Chapter 418, U. S. Statutes at Large, Vol. 39, Part I, Public Laws, pages 619, 645)" to take possession and assume control of the transportation systems of the country. The President acted under the authority conferred by this statute by proclamation dated December 26, 1917, and took possession and assumed control of the steam railway lines of the country, stating in said proclamation that nothing therein stated should affect the possession, operation and control of street electric passenger railways and interurban railways, but that if it should be found necessary or desirable later he would take possession and assume control of these street and interurban properties.

Your petitioners further represent that a great many of the street railway companies of the country have requested the President of the United States to exercise the power conferred upon him by Congress and to take them over and operate them because of the very embarrassing situation financially in which they find themselves, due to the great increases in operating expenses caused by the war, but he has not as yet taken favorable action upon any of these requests.

From the foregoing statement it is evident that the questions presented and the issues involved in this case

are almost identical with the questions presented and the issues involved in the case of *The Columbus Railway, Power and Light Company vs. City of Columbus, et al*, No. 715, October Term, 1918, which has been advanced and set down for hearing on January 6, 1919, and on this account your petitioner files this its petition and motion that this case be advanced upon the docket of this Court and be heard with the aforesaid case, No. 715.

And your petitioner will ever pray.

KARL E. BURR
JOSEPH S. CLARK
HENRY J. BOOTH
W. O. HENDERSON
Attorneys and Counsel for Petitioners

STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss:*

being duly sworn according to law, deposes and says that he has read the foregoing motion and petition; that he has knowledge of the facts therein set forth, and that the facts therein set forth are true and correct.

Sworn to and subscribed before
me this day of ,
1918.

Notary Public